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Supreme Court, U.S.
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No. 01-954

IN THE

Supreme Court of the United States

WILEY GENE WILSON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

CHRISTOPHER G. BROWNING, JR. *
HUNTON & WILLIAMS
One Hannover Square
421 Fayetteville Street Mall
Raleigh, North Carolina 27601
(919) 899-3000

* Counsel of Record

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ARGUMENT

A. The Fourth Circuit's holding that the intentions of the prosecutor who seeks an indictment is irrelevant places the Fourth Circuit in direct conflict with other circuits.

The Fourth Circuit's decision makes clear that the motivations of the prosecutor seeking the indictment (and not the motivations of the referring prosecutor) is determinative as to whether an indictment is tainted by vindictive animus. The Fourth Circuit stated:

> There is no evidence that the North Carolina U.S. Attorney [the attorney seeking the indictment] or her assistants acted with any purpose of punishing Wilson's victory in the firearm-possession case or of vindicating any personal interest of the U.S. Attorney in South Carolina [the referring prosecutor] to punish Wilson for exercising his right to appeal the South Carolina conviction.

Pet. App. 22. The Fourth Circuit's holding that the motivations of the referring prosecutor are irrelevant places it in direct conflict with the Second, Third, Sixth and Seventh Circuits. *United States v. Koh*, 199 F.3d 632, 640 (2d Cir. 1999); *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989); *United States v. Adams*, 870 F.2d 1140, 1146 (6th Cir. 1989); *United States v. Monsoor*, 77 F.3d 1031 (7th Cir. 1996).

In its response, the Government attempts to minimize the difference between these circuits by emphasizing that the Fourth Circuit rejected the district court's determination that the South Carolina U.S. Attorney held a vindictive animus. Resp. 9. The Government correctly notes that the Fourth Circuit reversed the district court's factual determination that federal prosecutors had a vindictive animus. In fact, the Fourth Circuit concluded that the South Carolina prosecutor

was motivated to refer the matter for prosecution not out of vindictive animus, but out of "concern that the defendant might soon be on the street and would thus pose a danger to the community." Pet. App. 29.

This statement by the Fourth Circuit, however, ignores the fact that South Carolina prosecutors blatantly lied as to whether they believed that Mr. Wilson would soon be released into the community. On March 13, 2000, the South Carolina prosecutor filed a brief with the Fourth Circuit in which he stated that Mr. Wilson would not be released from prison until November 2001 (20 months later). On March 14, 2000, however, South Carolina prosecutors sent an email urging North Carolina prosecutors to seek an indictment so that Mr. Wilson would not be a threat to others upon his release. The copy of this email in the files of the North Carolina prosecutors bears the handwritten word "imminent." The Government's argument that Mr. Wilson cannot show "a vindictive motive by any prosecutor," Resp. 10, simply does not stand up under the facts in the present Record. Although certiorari should not be granted to correct an erroneous factual finding, here, the Fourth Circuit made an erroneous legal conclusion that the motivations of the referring prosecutor are irrelevant. This Court should grant certiorari to address that issue.

B. Certiorari should be granted to address the appropriate standard of review.

Unquestionably, the standard of review applicable to a vindictive prosecution claim is unsettled. *See, e.g., United States v. Montoya*, 45 F.3d 1286, 1291 (9th Cir. 1995). The Government, however, argues that Mr. Wilson could not prevail regardless of which standard of review is applied. Here, the Fourth Circuit construed various facts differently from the district court. The district court, however, was in a much better position than the Fourth Circuit to weigh and

evaluate the circumstances surrounding the indictment and the truth and veracity of the witnesses who appeared at the evidentiary hearing. The outcome of this appeal hinges on the standard of review that is applied. This case stands as an appropriate vehicle to resolve the uncertainty among the circuits as to the standard of review.

C. The Fourth Circuit's holding that a *de novo* standard of review should be applied to the district court's discovery orders is not *dicta*.

In addition to the standard of review applicable to the district court's order dismissing the indictment, this action raises an important issue with respect to the standard of review applicable to discovery orders in a criminal case. Despite the clear split among circuits as to the appropriate standard of review applicable to a district court's discovery orders, the Government argues that certiorari should not be granted on this issue. Specifically, the Government argues that the Fourth Circuit's statements with respect to the standard of review of discovery orders was dicta. Resp. 16. These statements, however, simply cannot be characterized as *dicta*.

The Fourth Circuit's decision clearly and unambiguously directs the district court to conduct no further proceedings with respect to the Government's refusal to comply with the subpoenas issued by the federal district court judge. The Fourth Circuit expressly stated that "[e]ven before a court allows a defendant to have discovery on the government's prosecutorial decisions, the defendant must overcome a significant barrier by advancing objective evidence tending to show the existence of prosecutorial misconduct." Pet. App. 19. The Fourth Circuit's opinion makes clear that the panel did not believe the circumstances surrounding Mr. Wilson's indictment were sufficient to overcome this "significant

barrier." In fact, the Fourth Circuit expressly stated that because of its ruling on the merits, it need not reach the district court's ruling ordering discovery.

The Fourth Circuit's statement that it would apply a de novo review with respect to discovery orders was not dicta. The Fourth Circuit's decision and the mandate from that court ties the hands of the district court and precludes the trial court from ordering discovery to get to the bottom of what the trial court views to be disturbing circumstances surrounding an indictment. This Court should grant certiorari to address a significant split between the circuits with respect to the standard of review.

CONCLUSION

The petition for writ of certiorari should be granted.

WILEY GENE WILSON

CHRISTOPHER G. BROWNING, JR. *
HUNTON & WILLIAMS
One Hannover Square
421 Fayetteville Street Mall
Raleigh, North Carolina 27601
(919) 899-3000

* Counsel of Record

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